CHEAK YOKE THONG

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH FJ
[CRIMINAL APPLICATION NO. 4 OF 1984]
5 MAY 1984

CRIMINAL LAW: *Application under s. 66(1) of the Courts of Judicature Act, to refer questions to Federal Court - Fear of bias on part of Magistrate - Judicial and legal service - Whether controlled by Attorney-General - Actual or likelihood of bias.*

The application was under s. 66(1) of the Courts of Judicature Act 1964, for leave to refer a number of questions for the Federal Court's determination. The applicant stated in his affidavit that he feared bias on the part of the Magistrate, who was a member of the public service of which the head was the Attorney-General, who was the Public Prosecutor who preferred the charge against him. The question agreed upon and submitted was whether, in the circumstances, it was reasonable to hold there could be bias or there was reasonable suspicion of bias whereby it was reasonable to say that justice may not seem to be done. Leave was allowed and the submission heard immediately.

Held:

[1] The applicant's fear of the possibility of the Magistrate being biased by itself was not sufficient. The applicant must show by evidence that the adjudicating officer or the tribunal was in fact biased or was likely to be so.

[2] The assumption that the Attorney-General had control of the Magistrate's service was erroneous both in fact and in law.

(a) The Attorney-General is not the head of the Judicial and Legal Service and it is not his decision alone which decides on the fate of a Magistrate's career.

(b) Further, the Magistrate had no pecuniary interest or personal gain to benefit from the trial of the applicant.

(c) Even assuming the Attorney-General was the head of the Judicial and Legal Service, under no circumstances could it be said that the Magistrate was under the influence of the Attorney-General and therefore part of the prosecution, resulting in "inherent or legal" bias. The present position of the Attorney-General in the system of criminal justice is perfectly in accord with the law and the Constitution.

[3] Regarding actual or likelihood of bias, the Magistrate's assurance that he would decide the case according to its merits and do justice according to the law must be accepted.

[4] Even if the present system of appointment of Magistrates and Presidents of Sessions Courts is regarded as defective, the doctrine of necessity can always be invoked to prevent failure of justice. So long as a trial or adjudication is held in accordance with recognised procedure which is designed to achieve impartiality and fair trial, no disqualification *ex necessitate* can vitiate that trial.

[Question answered in the negative. Trial to commence forth with.]

Case referred to:
The Judges v. Attorney-General for Saskatchewan [1937] 53 TLR 464

Legislation referred to:
Courts of Judicature Act 1964, s. 66(1)
Criminal Procedure Code, s. 307(i)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 45, 46, 47
Penal Code, ss. 393, 397
Subordinate Courts Act 1948, ss. 78, 79

For the applicant - A.K.J. D'Cruz (Yusuf Khan & S. Seeralan with him)
For the respondent - Lim Beng Choon, SFC

JUDGMENT

Salleh Abas LP:

This is an application by Cheak Yoke Thong, under s. 66(1) of the Courts of Judicature Act 1964, for leave to refer a number of questions for the Federal Court's determination.

Cheak was charged with an offence of attempted robbery with deadly weapon under ss. 393 and 397 of the Penal Code, an offence which was alleged to have been committed by him jointly with one Wong Kim Seong. His trial was due to be held on 13 January 1984 and on that date when the case came before the Magistrate, Seremban, Encik Zaini bin Abdul Rahman, his Counsel made an application asking the Magistrate to disqualify himself from hearing the case on the ground that Cheak feared that the Magistrate would be biased because the Magistrate is a member of the Judicial and Legal Service of which the Attorney-General, being the Public Prosecutor at whose instance the charge against Cheak was preferred, is the head.

The Magistrate refused the application. But, on the day before, that is on 12 January 1984, upon a similar application in another case the same Magistrate allowed the application and disqualified himself. Cheak appealed to the High Court against the dismissal of his application and the appeal was heard by Hashim Yeop A. Sani FJ. The learned Judge dismissed the appeal and held that the application being a procedural matter, the decision of the Magistrate could not be a subject matter of an appeal under s. 307(i) of the CPC. However, since the matter has created some degree of uncertainty amongst judicial officers and some measure of publicity in the press, he proceeded to review the case with a view to exercising his revisionary power. In the end he came to the conclusion that there was no question of actual bias because the trial has not yet started and concluded, nor was there any likelihood of bias. We have read his judgment and with respect we wholly agree with it.

In his application for leave before us Cheak framed no less than seven questions he would like us to determine. Looking at these questions we are of the opinion that they are nothing more than repetitions of his grounds of appeal put forward before the Court below. These questions are directed to establish a ruling that the Magistrate is biased and, therefore, should disqualify himself because the Attorney-General, being the Public Prosecutor, is the head of the Judicial and Legal Service of which the Magistrate is a member. This is amplified in para. 5 of the affidavit of Cheak's solicitor who stated:

> ... the applicant feared Bias on the part of the Court as the Learned Magistrate is a member of a public service which the Head of Service is the Attorney-General, who is the Public Prosecutor, in whose instance, the charge against the applicant was preferred.

At our suggestion Counsel reframed the seven questions to the following single question: *a*

> whether the fear on the applicant's part that the learned Magistrate being a member of the Judicial and Legal Service of which the Attorney-General is the highest ranking officer, having control of the learned Magistrate's career in the said Service was reasonable to hold that there could be bias or there was reasonable suspicion of bias whereby it was reasonable to say that in those circumstances justice may not seem to be done.

b

We allowed the leave and immediately thereafter heard the submission.

From the above question, two issues are raised. Firstly, whether Cheak's fear of the possibility of the Magistrate being biased, whether the fear be justified or not, is a sufficient reason for the Magistrate to disqualify himself from hearing the case. Secondly, whether the assumption upon which the question is framed in that the Attorney-General is "having control of the learned Magistrate's service" is factually or legally correct. As to the first issue, surely no *c* one could come to Court and seek for the dismissal of the case against him or for a trial by another tribunal just because he said that the adjudicating officer would be biased against him. On this ground alone the application should be turned down. His fear alone is not sufficient. He must, however, show by evidence that the adjudicating officer or the tribunal is in fact biased or is likely to be so. Hashim Yeop A. Sani FJ has examined this question and we see no reason to differ from his view. As to the second issue, this too was dealt *d* with by the learned Judge and we agree with him that the assumption is erroneous both in fact and in law.

The law on bias which disqualifies an adjudicating officer from an adjudication is summarised in Latin maxim "*nemo debet esse judex in propria causa*", meaning no one should be Judge in his own cause. This time-honoured principle is based on the desirability of maintaining *e* public confidence and respect in the administration of justice. Thus, no one who is himself a party to the proceedings or who has any direct pecuniary interest in the result is qualified to adjudicate in those proceedings. But the Court will not disqualify him merely because of his words, deeds or his association with a party who is instituting or defending the proceedings before him unless the circumstances of the case show that there is a real likelihood or reasonable suspicion of bias. (de Smith's 4th Edn. p. 251).

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In this case it is clear that Encik Zaini, the Magistrate, has no pecuniary interest or personal gain to benefit from the trial of Cheak. He was not concerned with the outcome of the trial as to whether the prosecution will succeed or fail. He was there to do a job and to hold a trial in accordance with the established procedure and evidence. Thus, there cannot be any bias at all.

What about the Attorney-General being the head of the Judicial and Legal Service? Would *g* this fact and his position vis-a-vis members of Service *per se* constitute a legal bias?

The learned Judge who heard the appeal held that the Attorney-General is not the head of the Judicial and Legal service and that it is not his decision alone which decides on the fate of the Magistrate's career in the Government service because the Magistrate together with all the other officers in the Judicial and Legal Service including the Attorney-General himself *h* is under the jurisdiction of the Judicial and Legal Service Commission. We see no reason to disagree with the opinion so expressed.

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We wish, however, to add that even assuming that the Attorney-General is the head of the Service, a term which is not known to the Constitution but conveniently used in the public service sector for administrative expediency, under no circumstances could the Magistrate be held to be under the Attorney-General, nor could he be said to be a party to the prosecution. The Magistrate is not appointed by the Attorney-General but appointed by the Ruler of the State (or in the case of Federal Territory by Yang di-Pertuan Agong) on the advice of the Chief Justice to whom the Magistrate is responsible and under whose administrative control he is placed (See ss. 78 and 79 of the Subordinate Court Act). His transfer from one judicial post to another judicial post is completely under the authority of the Chief Justice, and as regards his transfer from a judicial post to a legal post under the aegis of the Attorney-General, this is a matter of consultation and agreement between the Chief Justice and the Attorney-General. Similarly, as regards his promotion and advancement in the Service, the confidential report on the Magistrate for this purpose is written by a Judge of the State where the Magistrate is currently or previously posted and this report is subject to the comments or recommendations by the Chief Justice for the ultimate consideration of the Judicial and Legal Service Commission. All the members of the commission are Judges including the two Chief Justices (of Malaya and Borneo), except for the Chairman and the Attorney-General, the Chairman being the Chairman of the Public Service Commission. Thus, under no circumstances could it be said that the Magistrate is under the influence of the Attorney-General and therefore part of the prosecution so as to give ground to any one to infer the so-called "inherent or legal" bias as opposed to factual bias.

The Attorney-General today is a civil servant. He belongs to the Judicial and Legal Service and being the highest paid officer in the Service it is natural that he assumes the leadership in the Service and is thus referred to as head of the Service for better or for worse. But this fact alone does not create an "inherent or legal bias" which Cheak wants the Magistrate to disqualify himself from hearing his case. Whether one likes it or not the present position of the Attorney-General in the system of criminal justice is perfectly in accord with the law and the Constitution. Being a member of the Judicial and Legal Service, the Attorney-General is a civil servant, and holds office - just as other officers and Magistrates do - during pleasure of the Yang di-Pertuan Agong, meaning his appointment is terminable by the Yang di-Pertuan Agong and his service is terminable by the Commission subject to the safeguards provided for in the Constitution. These facts are all the legal and constitutional realities and we cannot see how a situation which is firmly established by law and Constitution can be said to be a legal bias.

As regards actual or likelihood of bias, the learned Magistrate said in his grounds of judgment that although he feared the Attorney-General, he gave an assurance that he would never give in to the Public Prosecutor's convenience and that he would decide the case according to its merits and do justice according to the rule of law. We see no reason not to accept his assurance, unless he did not mean what he said. After all the fear that he entertained is a self-induced and misguided fear. There is no reason at all for him to be afraid. In fact when we look at his judgment, we are left in no doubt that the Magistrate was a courageous person especially when he revealed his dissatisfaction and that of his colleagues and the low morale in the Judicial and Legal Service. To have alleged that the Attorney-General is responsible for this state of affairs and usurping powers requires a person of very great courage indeed.

Magistrates and Presidents and other officers in the Judicial and Legal Service may have certain views and feelings towards their service, and that is natural, but such views and feelings are completely a domestic affair between them and those who have to run the service.

No one should be allowed to take advantage of it especially to exploit it in the Court of law to stop a trial. Nor should the Magistrates allow themselves to be used by others for the purpose. We think the judgment of Hashim Yeop A. Sani FJ should have laid the matter to rest. To continue raising the issue in this application only serves to create and continue the suspicion in the minds of the innocent public that there is no fair trial in the Subordinate Courts in this country because of the position of the Attorney-General vis-a-vis the legal and judicial officers. This, in our view, is highly mischievous and irresponsible. In fact the brunt of the criticisms levied against the Courts' rulings in refusing disqualification are directed against the Attorney-General personally. Such tactic is to be deplored because the Court is neither a forum to advocate changes in the appointment of officers of the realm nor even changes in the law. Whilst Counsel has every right to urge any submission on behalf of his client and he can do so without fear or favour, certainly that right is not an absolute one. It must be limited in terms of honesty, sincerity, propriety and decency. It is certainly an abuse of process to make an innocent Magistrate, raw and inexperienced, a mere pawn with which attacks on the Attorney-General are mounted. Early trial is what our system of criminal justice is striving for. Yet how is this application going to help achieving it? From the records the case is already five years old. Thus, it appears that not only the Magistrate but also the accused have been used to further the interests of those who have disagreement with the Attorney-General. This is serious and we only hope that our impression of abuse of process is not true.

Reverting to the law, even if the current system of appointment of Magistrates and Presidents of Sessions Courts and the appointment of Attorney-General and other officers is regarded as defective and not conducive towards impartiality in the administration of justice (which, in our view, is far from being so) until it is changed, the system must go on. If the submission of Cheak is accepted it will mean that all Magistrates and Presidents of Sessions Courts in this country will have to disqualify themselves from hearing any criminal prosecutions at the suit of the Public Prosecutor. Such a situation will cause a failure of justice as the whole administration of justice in the Subordinate Courts will come to a standstill. The law will not be so powerless as to allow the situation to develop. The doctrine of necessity can always be invoked to prevent it from happening. Just as *ex necessitate* the Yang di-Pertuan Agong is authorized by the Constitution to declare a state of emergency when he is satisfied that an emergency situation exists, similarly *ex necessitate* the Magistrate is competent and obliged to adjudicate even though he is *prima facie* disqualified for interest or bias, if declining to do so, would lead to failure of justice. There are many cases and instances in other common law jurisdictions in which the doctrine of necessity was successfully invoked and applied. To quote as an example, the Judges of Saskatchewan were told to be under an obligation *ex necessitate* to Judge upon the constitutionality of a legislation rendering them liable to pay income tax on their salaries. *(The Judges v. Attorney-General for Saskatchewan* [1937] 53 TLR 464). But the doctrine must not be used to camouflage an arbitrary power. While it can be invoked to prevent failure of justice it must not be used as an affront of justice. This means that so long as the trial or adjudications is held in accordance with the recognized procedure which is designed to achieve impartiality and fair trial, no disqualification *ex necessitate* can vitiate that trial. (de Smith, 4th Edn. pp. 251 and 276).

In our system not only is there room to doubt the existence of legal bias, but also our law of procedure and evidence meets the required standard designed to ensure fair and impartial trial and to prevent miscarriage of justice. We, therefore, see no substance in this application.

There is, however, one other matter we would like to comment here, and that is this: The filing of this application to the Federal Court was accompanied by such a fanfare in the local newspapers (please refer to "The Star" dated 10 April 1984) that we cannot help concluding that the details of the case reported in the press could not be otherwise than the result of prior interview between the solicitors and newspaper reporters. We view this very seriously as the practice only serves to mislead the public and also embarrasses the Court. In this case it was in the press that the several questions were posed for the Federal Court's determination whilst the application was not yet brought to our attention. We think lawyers should refrain themselves from briefing the press on matters pending before the Court, especially when they have not been properly before it. We would like to remind them of rr. 45, 46 and 47 of the Legal Profession (Practice and Etiquette) Rules 1978, which seem to us to be relevant in the circumstances of this case. We hope that the rules are not dead letters.

Our answer to the question is in the negative and we order that the trial must commence without further delay.

Also found at [1984] 2 CLJ 83